KAB Corp Sdn Bhd & Anor v Master Platform Sdn Bhd and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-04(IM)(NCVC)-404–09 OF 2017 AND W-04(IM)(NCVC)-405–09 OF 2017
VERNON ONG, HARMINDAR SINGH AND HAS ZANAH JJCA
15 JULY 2019

Contract — Implied terms — Reasonableness — Whether party given absolute discretion under contract must exercise discretion reasonably, honestly and in good faith — Whether such discretion should not be exercised in arbitrary, unreasonable, unfair or oppressive manner — Master title owner ('MT owner') of land on which commercial building stood agreed to consent to assignment of one of unit in building to bank provided administrative fee paid — Consent of MT owner to assignment required pending issuance of strata titles for building — Contract between parties allowed MT owner to charge such administrative fee as it thought fit for giving of consent — Whether fee of 1% on value of property or loan amount arbitrary, unreasonable, unfair and oppressive — Whether fee only to update records of beneficial interests of unit owners pending issuance of strata titles — Whether administrative work involved same in each case; hence fee charged should not vary with value of property or of the transaction involved — Whether MT owner could only charge nominal fee for giving of consent

The first appellant ('KAB') owned an office unit in a commercial building situated on the respondent's land. The respondent had management rights over the building. Strata titles for the office units had not been issued. When the respondent's consent was sought to the assignment of KAB's office unit to a bank to secure a RM6.5m loan to the second appellant ('Impiana'), it agreed to give the consent if an administrative fee of RM65,000 was paid, ie, 1% of the loan sum. Impiana protested that the amount was unreasonable, but the respondent maintained that it had the contractual right to impose the sum under cl 16.07 of the House Rules which governed the occupation and usage of the building by all its occupants. The House Rules were binding on the joint management body and all unit owners in the building. Impiana paid the fee under protest and on a without-prejudice basis. Thereafter, the appellants applied to the sessions court for a declaration that the fee imposed by the respondent was excessive or illegal; that the monies paid be returned; that the respondent imposed only a nominal fee of RM100 or such other sum as was ordered by the court; that the respondent be ordered to pay aggravated and exemplary damages and also that it expedite the issuance of the strata title. The sessions court declared that the administrative fee charged by the respondent was illegal and ordered it to be returned with interest. The respondent was also

ordered to pay RM25,000 in exemplary damages. On the respondent's appeal, the High Court set aside the sessions court's orders. The High Court held that pursuant to cl 16.07 of the House Rules and cl 20 of the sale and purchase agreement ('SPA'), the respondent had absolute discretion to fix the amount of the administrative fee and that Impiana, being a stranger to both the SPA and the House Rules, had no right to object or to bring the action against the respondent. The court held that the award of exemplary damages was also wrong as the respondent had not acted in a vengeful or oppressive manner. Appeal No 404 herein was against the High Court's setting aside of the sessions court's declaratory order and finding on liability while Appeal No 405 was against the setting aside of the award of exemplary damages.

Held, allowing Appeal No 404, dismissing Appeal No 405, setting aside the orders of the High Court and reinstating the orders of the sessions court:

(1) Although pursuant to cl 20 of the SPA and cl 16.07 of the House Rules, the respondent had absolute discretion to determine the amount of the administrative fee, it could not subject the appellants to its uninhibited whim and fancy. The authorities showed that not only must the discretion be exercised honestly and in good faith but, having regard to the provisions of the SPA and the House Rules, it must not be exercised arbitrarily or unreasonably. The authorities were clear that such a limitation applied as a matter of necessary implication. The rationale for such a limitation was the presumption that the reasonable expectation and common intention of the parties was that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion. The party invested with the discretion had to properly direct itself to the task at hand and not exercise the discretion for an ulterior motive. The requirement not to exercise the discretion unreasonably was analogous to *Wednesbury* reasonableness (see paras 21 & 29).

(2) There was significant inequality of bargaining power between the parties as the appellants had to obtain the respondent's written consent and pay the administrative fee imposed before any transaction involving the office unit could be carried out. The respondent, being the dominant party, was in a clear conflict of interest position because its decision affected the appellants and itself. In such circumstances, it was necessary to imply a term as to how the contractual discretion should be exercised in the context of the SPA and the House Rules (see paras 30 & 34).

(3) The flat fee rate of 1% imposed regardless of the value of the property or the loan facility involved was arbitrary, unreasonable, unfair and oppressive. The respondent was responsible for keeping the records of all the units in the building for verification of the beneficial interests of the respective buyers thereof and this was necessary as the strata titles had yet to be issued (see paras 31–32).

(4) The necessity of applying to the respondent for its consent was only an administrative expediency since KAB had paid the full purchase price for its unit and had no continuing obligations under the SPA. Rather, the respondent was obliged to ensure that the strata title once issued was duly registered in KAB's name and until then it had to maintain the records. The administrative work involved was the upkeep of the records which obligation was a result of the respondent's failure and/or neglect to obtain the strata title despite the lapse of time after the completion of the building. The work of keeping and updating the records was the same for each and every office unit. Instead of imposing a flat fee for the giving of consent, the respondent imposed a 1% rate which resulted in varying amounts being charged based on the value of the transaction. This ignored the fact that the work done was the same in each case irrespective of the value of the transaction. Even if the value of the properties appreciated considerably over time, the benefit accrued to the buyers who had already paid their purchase prices in full. The court was of the view that a nominal administrative fee of RM500 was fair and reasonable (see paras 32 & 34–35).

(5) The respondent did not, in fact, give any undertaking to the bank. Therefore, its argument that the administrative fee was to cover risks that it had to assume was unsubstantiated and without merit (see para 34).

[Bahasa Malaysia summary

Perayu pertama ('KAB') memiliki satu unit pejabat yang berada di atas tanah milik responden. Responden mempunyai hak untuk mengurus terhadap bangunan tersebut. Hakmilik Strata untuk unit pejabat tersebut belum dikeluarkan. Apabila izin responden dipohon untuk penyerahhakkan unit pejabat KAB kepada satu bank untuk menjamin pinjaman berjumlah RM6.5 juta kepada perayu kedua ('Impiana'), dia bersetuju untuk memberikan izin sekiranya satu yuran pentadbiran berjumlah RM65,000 dibayar, iaitu 1% daripada jumlah pinjaman. Impiana membuat bantahan bahawa jumlah tersebut tidak munasabah, akan tetapi responden menegaskan bahawa dia mempunyai hak kontraktual untuk mengenakan jumlah tersebut di bawah klausa 16.07 Peraturan Rumah yang mentadbir penghunian dan penggunaan bangunan tersebut oleh semua penghuninya. Peraturan Rumah tersebut adalah mengikat kepada 'Badan Pengurusan Bersama' dan semua pemilik unit dalam bangunan tersebut. Impiana telah membayar yuran tersebut di bawah protes dan tanpa prejudis. Selepas tu, perayu memohon kepada mahkamah sesyen untuk satu deklarasi bahawa yuran yang dikenakan oleh responden adalah melampau atau haram; bahawa wang yang dibayar dipulangkan; bahawa responden hanya mengenakan yuran nominal berjumlah RM100 atau apa-apa jumlah yang diperintahkan mahkamah; responden diperintahkan untuk membayar RM25,000 dalam ganti rugi teladan. Atas rayuan responden, Mahkamah Tinggi mengetepikan perintah mahkamah

A sesyen. Mahkamah Tinggi memutuskan bahawa selaras dengan klausa 16.07 Peraturan Rumah dan klausa 20 perjanjian jual beli ('PJB'), responden mempunyai budi bicara mutlak untuk menetapkan yuran administratif dan Impiana, yang merupakan seorang asing kepada PJB dan Peraturan Rumah, tiada hak untuk membantah atau membawa tindakan terhadap responden. B Mahkamah memutuskan bahawa award ganti rugi teladan juga salah memandangkan responden tidak bertindak dalam cara membalas dendam atau menindas. Rayuan No 404 di sini adalah terhadap Mahkamah Tinggi mengetepikan perintah deklarasi Mahkamah Rayuan dan dapatan liabiliti manakala Rayuan No 405 adalah terhadap pengetepian awad ganti rugi C teladan.

Diputuskan, membenarkan Rayuan No 404, mengetepikan Rayuan No 405, mengetepikan perintah Mahkamah Tinggi dan meletakkan semula perintah mahkamah sesyen: D

(1) Walaupun selaras dengan klausa 20 PJB dan cl 16.07 Perintah Rumah, responden mempunyai budi bicara mutlak untuk menetapkan jumlah yuran administratif, ianya tidak boleh menyebabkan perayu tertakluk kepada keinginannya tanpa had. Autoriti menunjukan bahawa budi E bicara tersebut mesti dilaksanakan dengan jujur dan dengan niat baik tetapi, mengambil kira peruntukan PJB dan Peraturan Rumah, ianya tidak boleh dilaksanakan secara sewenang-wenangnya atau tidak munasabah. Autoriti adalah jelas bahawa had sedemikian terpakai sebagai satu implikasi yang perlu. Rasional untuk had sedemikian adalah F anggapan bahawa jangkaan munasabah dan niat bersama pihak-pihak adlaah perlu agar ianya tulus dan rasional, dan bukannya penggunaan budi bicara yang kosong dan tidak rasional. Pihak yang telah diberikan budi bicara tersebut hendaklah mengendalikan dirinya kepada tugas tersebut dan tidak melaksanakan budi bicara tersebut untuk satu motif G yang lain. Keperluan untuk tidak melaksanakan budi bicara tersebut adalah sama seperti kemunasabahan *Wednesbury* (lihat perenggan 21 & 29).

(2) Wujud ketidaksamarataan kuasa tawar menawar antara pihak-pihak H memandangkan perayu perlu untuk mendapatkan izin bertulis responden dan membayar yuran administratif yang dikenakan sebelum apa-apa transaksi melibatkan unit pejabat tersebut boleh dijalankan responden yang merupakan pihak yang dominan berada dalam keadaan yang kepentingannya bercanggah kerana keputusannya memberi kesan I kepada perayu dan dirinya sendiri. dalam keadaan sedemikian, adalah perlu untuk menyatakan satu teras bagaimana budi bicara kontraktual tersebut perlu dilaksanakan dalam konteks PJB dan peraturan rumah (lihat perenggan 30 & 34).

(3) Kadar yuran tetap 1% yang dikenakan tanpa mengambil kira nilai

hartanah atau fasiliti pinjaman yang dilibatkan adalah sewanang-wenang, tidak munasabah, tidak adil dan menindas. Responden bertanggungjawab untuk menyimpan rekod semua unit dalam bangunan tersebut untuk pengesahan untuk kepentingan benefisial pembeli dan ini adalah perlu memandangkan hakmilik strata belum lagi dikeluarkan (lihat perenggan 31–32).

(4) Keperluan untuk memohon kepada responden untuk izinnya hanya sekadar satu suai faedah administratif memandangkan KAB telah membayar harga belian penuh untuk unitnya dan tiada lagi obligasi berterusan di bawah PJB. Responden pula mempunyai obligasi untuk memastikan hakmilik strata selepas dikeluarkan telah didaftarkan dalam nama KAB dan sehingga waktu itu, responden perlu menjaga rekod. tugas administratif yang terlibat adalah sengaraan rekod tersebut yang mana obligasi tersebut adalah kesan kegagalan atau kecuairan responden untuk mendapatkan hakmilik strata walaupun tempoh luput selepas penyelesaian bangunan tersebut. Tugas untuk menyimpan dan mengemaskini rekod tersebut adalah sama untuk setiap satu unit pejabat. Responden tidak mengenakan yuran tetap untuk pemberian izin, sebaliknya mengenakan kadar 1% yang menyebabkan amaun berbeza dikenakan berdasarkan nilai transaksi. Ini tidak mengendahkan fakta bahawa kerja yang dilakukan adalah sama dalam setiap kes tidak mengambilkira nilai transaksi. walaupun nilai hartanah tersebut telah meningkat selepas masa berlalu, keuntungan yang didapati adalah kepada pembeli yang telah membayar harga belian mereka sepenuhnya. mahkamah berpandangan bahawa yuran administratif nominal RM500 adalah adil dan munasabah (lihat perenggan 32 & 34–35).

(5) Responden tidak memberikan apa-apa aku janji kepada bank. Oleh itu, hujahannya bahawa yuran administratif untuk menanggung risiko yang ianya menyandang tidak berasas dan tanpa merit (lihat perenggan 34).]

Notes

For cases on implied terms in general, see 3(4) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 6223–6224.

Cases referred to

Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2) [1993] 1 Lloyd's Rep 397, CA (refd)

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, CA (refd)

Braganza v BP Shipping Ltd; The British Unity [2015] UKSC 17, SC (refd)

British Telecommunications plc v Telefonica O2 UK Ltd [2014] UKSC 42, SC (refd)

CVG Siderurgicia del Orinoco SA v London SS Owners' Mutual Insurance Association Ltd, The Vainqueur José [1979] 1 Lloyd Rep 557, QBD (refd)

A *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047, CA (refd)
Hayes v Willoughby [2013] UKSC 17, SC (refd)
Koh Siak Poo v Perkayuan Oks Sdn Bhd & Ors [1989] 3 MLJ 164, SC (refd)
Ludgate Insurance Co Ltd v Citibank NA [1998] Lloyd's Rep IR 221, CA (refd)
B *Paragon Finance plc v Nash* [2001] EWCA Civ 1466, CA (refd)
Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135, FC (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145, FC (refd)
C *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] EWCA Civ 116, CA (refd)

Legislation referred to

Building and Common Property (Maintenance and Management) Act 2007 (repealed by the Strata Management Act 2013) s 8(2)
D Housing Development (Control and Licensing) Act 1966 ss 220, 220(4)
Strata Management Act 2013
Strata Titles Act 1985 s 8

E **Appeal from**: Civil Appeal No WA-12ANCVC-60–04 of 2016 (High Court, Kuala Lumpur)

Rajan Navaratnam (Sharifah Munirah with him) (Rajan Navaratnam) for the appellants.
F *Tharminder Singh (Tan Shu Ying with him) (Izral Partnership) for the respondent.*

Vernon Ong JCA:

INTRODUCTION

G

[1] This case relates to a dispute on the amount of the administrative fee imposed by the master title owner of a commercial building as a condition for giving their consent to an assignment in favour of a bank.

H **[2]** KAB Corporation Sdn Bhd is the owner of an office unit in a commercial building previously known as Menara Promet. The office unit was purchased from Promet Developments Sdn Bhd in 1983. In 2005, Promet Developments sold the land on which Menara Promet was erected to Master Platform Sdn Bhd; the management rights to Menara Promet was also assigned to Master
I Platform. Menara Promet was renamed as Menara KH. Subsequently, Master Platform became the master title owner of the land. The strata titles to the office units in Menara KH have not yet been issued.

[3] In 2005, Impiana Sdn Bhd (a related company of KAB) applied for an

additional loan facility of RM6.5m from a bank on the security of a third party assignment of KAB's office unit. The bank's solicitors wrote to Master Platform requesting for, inter alia, its consent for the third party assignment in favour of the bank. Master Platform agreed to give its consent subject to payment of RM65,000 being its administrative fee.

[4] There followed an exchange of communications in which Impiana contended that the amount of administrative fee imposed was unreasonable and excessive whilst Master Platform asserted that the administrative fee imposed was pursuant to its contractual right under cl 16.07 of the Menara Promet House Rules ('House Rules'). Eventually Impiana paid the administrative fee under protest and on a without prejudice basis. A receipt in acknowledgement of the payment was issued by Master Platform on 5 June 2015.

[5] In September 2015, KAB and Impiana (the first and second plaintiffs) took out an originating summons in the sessions court against Master Platform ('the defendant'). In summary, they sought for a declaration that the administrative fee imposed is illegal or excessive. They also asked for: (a) a return of the monies paid; (b) aggravated and exemplary damages; (c) an order that they pay a nominal administrative fee of RM100 or such sum as ordered by the court; and (d) an order that Master Platform take the necessary steps for the issuance of strata title.

[6] After hearing of parties, the sessions court declared that the administrative fee of 1% amounting to RM65,000 is illegal. The defendant was ordered to return the sum of RM65,000 together with interest. Aggravated and exemplary damages was also ordered to be assessed. On assessment, exemplary damages of RM25,000 was awarded against the defendant.

[7] The defendant lodged two appeals at the High Court; one against the finding of liability and the other against the damages assessed. The defendant's appeals were allowed by the High Court and the orders of the sessions court on liability and damages were set aside. Dissatisfied, the plaintiffs appealed against the orders of the High Court.

[8] Appeal No 404 is the plaintiffs' appeal against the High Court's decision setting aside the sessions court's declaratory order and finding on liability. Appeal No 405 is the plaintiffs' appeal against the High Court decision setting aside the sessions court's order on the exemplary damages. After hearing of submission of the parties, we allowed Appeal No 404 and dismissed Appeal No 405. Our reasons are as follows.

A FINDINGS OF THE HIGH COURT

[9] The learned judge found that pursuant to cl 16.07 of the House Rules and cl 20 of the sale and purchase agreement ('SPA') the defendant: (a) was entitled to impose the administrative fee; and (b) could determine at their absolute discretion the amount of the administrative fee. Therefore, the administrative fee of 1% amounting to RM65,000 was reasonable and not exorbitant. Impiana has no right to object because it did not have the locus standi to bring the action as it is not a party to the SPA.

[10] The learned judge also found that on the evidence, the defendant did not act in a vengeful and oppressive manner so as to justify the award of exemplary damages. As the plaintiffs did not appeal against the sessions court's decision in not ordering the defendant to apply for strata title, the fact of delay in obtaining strata title is a non-issue.

SUBMISSION OF PARTIES

[11] Learned counsel for the plaintiffs argued that the imposition of the administrative fee of RM65,000 is arbitrary, unreasonable, unlawful, excessive and oppressive. His argument is mounted on the following grounds:

(a) cl 20 of the SPA provides that consent should not be unreasonably withheld;

(b) cl 20 must be read with cl 7 which requires the defendant to apply to the relevant authorities for the issuance of the strata titles;

(c) cl 20 makes no mention of administrative fee for assignment but only for transfer;

(d) the defendant was obliged to apply for the strata titles within six months after completion of the commercial building under s 8 of the Strata Titles Act 1985 ('the STA 1985');

(e) cl 16.07 of the House Rules did not state that consent is required where the property is used as security for third party financing;

(f) cl 16.07 of the House Rules did not prescribe any rate to be imposed;

(g) the House Rules only applies between KAB and the joint management body;

(h) cl 16.07 is ultra vires the Building and Common Property (Maintenance and Management) Act 2007 ('the BCPA 2007') as it does not allow for imposition of administrative charges on behalf of the master title owner;

(i) there is no basis or justification for the defendant to impose such a high sum as the administrative fee is only imposed for the purpose of updating the records kept by the respondent;

(j) even if the defendant is entitled to impose an administrative fee, such fee must be reasonable and justified (s 220(4) of the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966')); and

(k) there are limits on contractual discretion and the defendant is required to take relevant issues into account and that the discretion is not exercised irrationally (*Braganza v BP Shipping Ltd; The British Unity* [2015] UKSC 17).

[12] In reply, learned counsel for the defendant submitted that the plaintiffs did not appeal against the decision of the sessions court in not allowing the prayers for: (a) a declaration that the 1% administrative fee of RM65,000 is excessive and exorbitant; (b) an order directing the defendant to apply to the relevant authority for the issuance of the strata titles; and (c) the plaintiffs pay a nominal administrative fee of RM100 or such sum as the court deems fair and appropriate. As such, the only issue in this appeals was the issue of illegality with respect to the imposition of the administrative fee.

[13] Secondly, even if there was delay in obtaining strata title, cl 19 of the SPA absolves the defendant of any liability. The defendant was entitled to impose administrative fees pursuant to cl 20 of the SPA. In addition, KAB had also separately affirmed the defendant's entitlement to impose such fees through cl 16.07 of the House Rules; which House Rules were unanimously adopted by the unit owners including KAB. As such, the defendant's entitlement to impose administrative fees arises from the contractual agreement between the parties (*Koh Siak Poo v Perkayuan Oks Sdn Bhd & Ors* [1989] 3 MLJ 164 (SC)). The rate of 1% imposed by the defendant is consistent with the market rate imposed in the building industry. Administrative fee is also justified as the defendant was required to give various undertakings to the bank in question; which undertaking exposes the defendant to liability under the loan taken by Impiana. As such, it was not solely a matter of pure consent.

[14] Thirdly, Impiana did not have the locus standi as it is neither a party nor privy to the SPA or the House Rules. Lastly, learned counsel for the defendant argued that the plaintiffs' originating summons did not ask for damages to be assessed. As such, the sessions court erred in ordering for the aggravated and exemplary damages to be assessed even though there were no directions for a bifurcated trial. At any rate, the damages were not proved.

A DECISION

[15] In this case, there are no facts in issue to be determined. The principal issue for determination relates to the application and interpretation of cl 20 of the SPA and cl 16.07 of the House Rules.

B

[16] The House Rules was promulgated by the joint management body ('JMB') for the proper maintenance and management of Menara Promet pursuant to s 8(2) of the BCPA 2007 (later repealed by the Strata Management Act 2013). Preamble (A) of the House Rules states that the House Rules was set up 'to govern the occupation and usage of the Building known as Menara Promet by all Occupants'. The House Rules is binding on the JMB and the owners of individual units comprised in Menara Promet (cl 2.02 of the House Rules).

C

D

[17] Clause 16.07 on 'Transfer and/or Assignment' provides that pending the issuance of strata title the owners shall not, inter alia, assign their individual units without the prior written consent of the master title owner; consent may be given or withheld at the master title owner's absolute discretion save and except where there is no subsisting breach of the SPA or the House Rules. Subclause 16.07(2) provides that such consent may be subject to the payment of 'an administrative fee of such amount as the Master Title Owner shall at its absolute discretion determine from time to time'.

E

F

[18] We now turn to cl 20 of the SPA which is as follows:

> 20. The Purchaser shall not re-sell transfer or assign the rights duties and obligations under this Agreement without the written permission of the Vendor first had and obtained such consent not to be unreasonably withheld and provided that *any transfer* fee *imposed by the Vendor* and the legal costs and expenses of such transfer or assignment (including the Vendor's solicitor's costs) *shall be borne absolutely by the Purchaser.* (Emphasis added.)

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We think that cl 20 is also quite clear. A fee is imposed by the defendant for the giving of consent for an assignment. In the light of the foregoing provisions, it is clear that the defendant was entitled to impose an administrative fee as a condition for the giving of the consent for the assignment.

H

[19] Even though both cl 16.07 of the House Rules and cl 20 of the SPA provide for the imposition of an administrative fee, there is no mention of the rate or amount in cl 20 of the SPA. However, cl 16.07 of the House Rules confers absolute discretion on the defendant to determine the amount.

I

[20] The defendant's stand is therefore premised on the SPA and the House

Rules which it contends gives it absolute discretion to determine the amount of administrative fee. The defendant also contends that the administrative fee imposed was reasonable because: (a) the rate imposed was the market rate; and (b) the risks it assumed due to its undertakings to the bank.

Exercise of contractual discretion

[21] Accordingly, it is now clear that pursuant to cl 20 of the SPA and cl 16.07 of the House Rules the defendant is invested with the contractual power to determine the amount of the administrative fee according to its absolute discretion.

[22] The word 'discretion' has been defined in innumerable ways; such as 'the right or ability to decide something' (*Cambridge Advanced Learner's Dictionary,* 2nd Ed) or 'the freedom to decide on a course of action' (*Concise Oxford English Dictionary,* 11th Ed). According to *Words, Phrases & Maxims*, Lexis Nexis: 'In its ordinary meaning, the word signifies unrestrained exercise of choice or will; freedom to act according to one's own judgment; unrestrained exercise of will; the liberty or power of acting without other control than one's own judgment. But, when applied to public functionaries, it means a power or right conferred upon them by law, of acting officially in certain circumstances according to the dictates of their own judgment and conscience, uncontrolled by the judgment or conscience of others. Discretion is to discern between right and wrong; and therefore whoever hath power to act at discretion, is bound by the rule of reason and law (2 Inst 56, 298. *Tomlin's Law Dic*)'. As such, absolute discretion implies the final and total power of acting on one's own judgement or the total and absolute unrestrained exercise of choice without any limits or control whatsoever.

[23] At common law, the principles relating to the exercise of discretionary powers in public law, in particular, administrative law are well settled. The foundation of the public law duty to exercise discretionary power in a reasonable manner was laid down in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 (CA). In Malaysia, the courts have the power of judicial review and supervision of administrative actions and control over the exercise of discretionary powers. The decisions of an inferior court, administrative tribunal or other public authority may be reviewed on the grounds of procedural impropriety, illegality, irrationality and possibly proportionality which permits the courts to scrutinise the decision not only for process but also for substance (*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 (FC)). In essence, the general rule is that there is no such thing as an absolute or unfettered discretion; a discretion must be exercised reasonably (*Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135).

[24] Is the requirement of reasonableness applicable in the realm of private law; as in this case where the defendant appears to have the absolute discretion to fix the amount of the administrative fee. The answer to this question may be found in the common law. The application of the common law principles to the exercise of a contractual discretion arose in the seminal case of *CVG Siderurgicia del Orinoco SA v London SS Owners' Mutual Insurance Association Ltd, The Vainqueur José* [1979] 1 Lloyd Rep 557. It involved a claim to indemnity under the rules of the P and I club of which the plaintiff was a member. Rule 8(k) provided that: 'A member shall *at the discretion of the Committee*, be liable to have a deduction made from any claim where the Committee shall be of opinion that the Member has not taken such steps to protect his interests as he would have done if the ship had not been entered in this class. This deduction shall be of such an amount *as the Committee in its discretion shall decide*'. (Emphasis added.) Mocatta J held that whenever a discretion is afforded to a party by contract it is an implied term that it must not be exercised unreasonably. The common law principles applicable to the exercise of a contractual discretion include fairness, reasonableness, bona fides and absence of misdirection in law.

[25] In *Braganza v BP Shipping Ltd & Another,* Lady Hale of the UK Supreme Court traced the interrelationship between the legal principles on contractual review and the common law principles on the exercise of administrative law review. In that case, Mr Braganza who was working as the chief engineer on an oil tanker disappeared one evening whilst the vessel was in the North Atlantic. Mr Braganza was never found and he was presumed dead. Mr Braganza's employer, BP Shipping Ltd conducted an internal inquiry which concluded that the most likely cause of Mr Braganza's death was suicide. On that premise, BP took the position that there had been 'willful default' within the terms of the employment contract so that death benefits would not be payable to his widow. Mr Braganza's widow brought a claim, inter alia, in contract against BP for death benefits, contending that the decision-power was subject to an implied term and that BP's decision-making failed to meet the standards imposed. The High Court allowed Mrs Braganza's contractual claim on the basis that BP had failed to prove that the opinion was reasonable in the circumstances. The weight of the evidence was not proportionate to the seriousness of the consequences of the finding and BP had failed properly to take account the real possibility that Mr Braganza had been involved in an accidental fall whilst out on deck in the course of his work. BP appealed to the Court of Appeal which took a different view. The Court of Appeal held that in all the circumstances BP's decision was a reasonable one, reached after an appropriate, detailed and careful enquiry.

[26] Mrs Braganza appealed to the UK Supreme Court which unanimously held that the decision-power was subject to an implied term. The central issues

in that case were the principles which governed the exercise of contractual power, and the general approach a court ought to take to applying those principles. The majority (Lady Hale, Lord Kerr and Lord Hodge, Lord Neuberger and Lord Wilson, dissenting) held that BP's decision-making fell short of the requirement imposed by the implied term. BP's finding that suicide was the most likely cause of death was not supported by the evidence. Consequently, Mrs Braganza was entitled to receive the death benefits.

[27] After conducting a review of the following authorities, Lady Hale intimated that there are signs that the contractual implied term is drawing closer and closer to the principles applicable in judicial review: *Abu Dhabi National Tanker Co v Product Star Shipping Ltd, The Product Star (No 2)* [1993] 1 Lloyd's Rep 397; *Paragon Finance plc v Nash* [2001] EWCA Civ 1466; *Ludgate Insurance Co Ltd v Citibank NA* [1998] Lloyd's Rep IR 221; *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd* [2001] EWCA Civ 1047; *Socimer International Bank Ltd (in liq) v Standard Bank London Ltd* [2008] EWCA Civ 116; *Hayes v Willoughby* [2013] UKSC 17; *British Telecommunications plc v Telefonica O2 UK Ltd* [2014] UKSC 42. Although the Justices disagreed as to the outcome of the appeal they agreed upon the content of the term to be implied. It was also unanimously agreed that a contractual decision-making power is limited, as a matter of necessary implication, by concepts of honesty, good faith and genuineness, and the need for the absence of arbitrariness, capriciousness and perversity and irrationality. Further, the UK Supreme Court held that both limbs of the *Wednesbury* test should apply ie: (a) relevant matters taken into account and irrelevant considerations must be excluded; and (b) the decision must not be one that no reasonable decision-maker could have made. Whilst none of the Supreme Court Justices explicitly justified the implied term on the basis of what Mr Braganza and BP intended, the rationale given by Lady Hale in her lead judgment was based on wider considerations of public policy to prevent abuses of power. As such, it appears that the term will be implied by operation of law and is not dependent on any enquiry into intentions nor on a finding that the parties intended to fetter the decision-power.

[28] It can therefore be discerned that the UK Supreme Court in *Braganza* not only applied the settled administrative law review principles, but unequivocally applied administrative law principles to contractual review. The UK Supreme Court recognised that it is common for contracts to confer powers of discretion, including decision, often upon one party to the contract; in most cases it is the dominant party. For instance, loan contracts invariably grant the lending financial institution the power to vary interest rates from time to time at their discretion. It is not for the courts to re-write the parties' bargain for them, still less to substitute themselves for the contractually agreed decision-maker. If, however, there is a risk where one party has the power to

make decisions which affect the rights of both parties to the contract, then that party has a clear conflict of interest. This particular conflict arises especially where there is a significant imbalance of power between the contracting parties. Accordingly, the courts have sought to ensure that such contractual powers are not abused. They have done so by implying a term as to the manner in which such powers may be exercised, a term which may vary according to the terms of the contract and the context in which the decision-making power is given. In other words, context will shape the content of the implied term and the practice of contractual review.

[29] We now return to the present case where the central issue relates to the principles which govern the exercise of contractual discretion by the defendant. In our considered view, the conferring of a contractual discretion on the defendant does not subject the plaintiffs to the defendant's uninhibited whim and fancy. The authorities show that not only must the discretion be exercised honestly and in good faith, but having regard to the provisions of the SPA and the House Rules, it must be not be exercised arbitrarily, capriciously or unreasonably. The authorities are also clear that such a limitation applies as a matter of necessary implication. The rationale for such a limitation is that it is presumed to be the reasonable expectation and therefore the common intention of the parties that there should be a genuine and rational, as opposed to an empty or irrational, exercise of discretion. At first blush, the requirement of honesty and good faith seems quite clear. The decision-maker invested with the discretion must properly direct itself to the task in hand and should not exercise the discretion for an ulterior motive. The requirement not to exercise the discretion unreasonably is not analogous to a duty to take reasonable care but to *Wednesbury* reasonableness (see para [27] above).

[30] In this instance, there is a significant imbalance of power between the plaintiffs and the defendant. First, the defendant's written consent is required before the plaintiffs can carry out any transaction of their office unit. Secondly, the plaintiffs are required to pay the administrative fee, the amount to be determined at the defendant's absolute discretion. Thus, there is no equality of bargaining power between the parties. Further, the defendant being the dominant party has a clear conflict of interest because it is exercising its power to make decisions which affect both the plaintiffs and itself. In such circumstances, it is in our view necessary to imply a term as to how the contractual discretion may be exercised, in the context of the SPA and House Rules.

[31] The defendant's justification was that the rate imposed was the market rate and that it had to give various undertakings to the bank. In our considered view, the flat rate of 1% imposed regardless of the value of the property or the loan facility involved is arbitrary and unreasonable. In the first place, the

defendant is responsible for the keeping of the records of all the units in Menara Promet for verification of the beneficial interests of the respective purchasers of the office units therein; this is rendered necessary as the strata titles to the office units have not yet been issued.

[32] As such, the necessity of applying to the defendant for its consent is only a matter of administrative expediency since KAB having paid the full purchase price for the office unit has no continuing obligations under the SPA. Rather, it is the defendant who has stepped into the shoes of the original developer Promet Developments and bears the continuing obligation to ensure that the strata title once issued is duly registered in KAB's name and until such time as that is fulfilled, the defendant will be under the continuing obligation of keeping the records. The administrative work undertaken by the defendant is the up keep of the records; which obligation and responsibility is as a result of their failure and or neglect to obtain the strata titles despite the lapse of time after the completion of Menara Promet. The work of keeping and up-dating of the records is the same for each and every office unit. Instead of imposing a flat fee for the giving of the consent, the defendant imposed a 1% rate; which results in varying amounts being charged based on the value of the transaction. Therefore, such a measure ignores the fact that the work done is the same. This distortion has become much more apparent in this case where the loan facility was for RM6.5m and the 1% rate imposed required Impiana to pay RM65,000. In our view, the imposition of the administrative fee was plainly arbitrary, unreasonable, unfair and oppressive. The defendant's reasons for the imposition of the administrative fee is without basis and untenable. We observe that there is unfortunately no statutory protection afforded to purchasers in commercial buildings against the imposition of such fees.

[33] There is, however, protection in respect of housing developments under the Housing Development (Control and Licensing) Act 1966 ('the HDA 1966') which was amended to allow a developer to only charge a fee of RM50 to verify and confirm the beneficial interests of a purchaser. The consent of the developer has also been dispensed with and the developer is only required to be given a copy of the deed of assignment and other documents for the purposes of updating the records (see s 220 of the HDA 1966).

[34] In the light of the abovementioned, we are of the view that the defendant had exercised its discretion unreasonably when it imposed the flat 1% rate for the administrative fee. The defendant failed to take into consideration that the work of updating the records was the same irrespective of the value of the transaction. At any rate, even if the value of the properties had appreciated considerably over time, the benefit accrues to the purchasers who have already paid the purchase price in full. The defendant's decision affected the plaintiffs and itself; as such the defendant was in a conflict of

A interest and the defendant failed to weigh the relevant factors before imposing the fee. We also note that in this particular instance, the defendant did not in fact give any undertaking to the bank. Therefore, the defendant's argument that they had to cover the risks which they assumed is without merit and unsubstantiated.

B

[35] For the foregoing reasons, we are of the view that a nominal administrative fee of RM500 is fair and reasonable. We therefore set aside the order of the High Court and reinstated the orders of the sessions court in prayers (b), (c), (e) and (f) of the originating summons. Consequent thereto, we allowed Appeal No 404 and dismissed Appeal No 405. We made no order as to costs of the appeals.

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Order accordingly.

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Reported by Ashok Kumar

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